Supreme Court, U.S.
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No. 04-1177

In The
Supreme Court of the United States

SINCLAIR BROADCAST GROUP, INC.,

Cross-Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

Cross-Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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March 2, 2005

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QUESTIONS PRESENTED

1. Whether the Third Circuit in effect impermissibly overruled the D.C. Circuit by ordering the Federal Communications Commission ("FCC") to continue to enforce a rule that the D.C. Circuit found insufficiently deregulatory and arbitrary and capricious and that the FCC on remand from the D.C. Circuit concluded could not be justified.

2. Whether the Third Circuit in conflict with the decisions of the D.C. Circuit incorrectly applied Section 202(h) of the Telecommunications Act of 1996 and therefore failed to set aside the restrictions retained by the FCC on local television ownership.

3. Whether the Third Circuit erred in upholding, against First Amendment challenges, the local television ownership rule of the FCC that singles out and places unique restrictions on television broadcasters, on the ground that a rational basis supported the regulation.

LIST OF PARTIES

Pursuant to Rule 14.1(b), the following list identifies the parties to the proceeding in the court whose judgment is sought to be reviewed.

The petitioners below were Prometheus Radio Project, Media General, Inc., National Association of Broadcasters, Network Affiliated Stations Alliance, ABC Television Affiliates Association, CBS Television Affiliates Association and NBC Television Affiliates, Fox Entertainment Group, Inc. and Fox Television Stations, Inc., Viacom Inc., National Broadcasting Company, Inc., Telemundo Communications Group, Inc., Sinclair Broadcast Group, Inc., Media Alliance, Paxson Communications Corporation, National Council of the Churches of Christ in the United States, Tribune Company, Emmis Communications Corporation, Center for Digital Democracy and Fairness & Accuracy in Reporting, Clear Channel Communications, American Hispanic Owned Radio Association, Civil Rights Forum on Communications Policy, League of United Latin American Citizens, Minority Business Enterprise Legal Defense and Education Fund, Minority Media and Telecommunications Council, National Asian American Telecommunications Association, National Association of Latino Independent Producers, National Coalition of Hispanic Organizations, National Council of La Raza, National Hispanic Media Coalition, National Indian Telecommunications Institute, National Urban League, Native American Public Telecommunications, PRLDEF-Institute for Puerto Rican Policy, Unity: Journalists of Color, Inc., and Women's Institute for Freedom of the Press.

The respondents below were the Federal Communications Commission and the United States of America.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Petitioner states as follows:

Sinclair Broadcast Group, Inc. ("Sinclair") is a publicly held company, which operates and provides programming and sales services to television stations in various cities across the country. Sinclair has no parent company and no publicly held company owns ten percent or more of Sinclair's stock.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Sinclair Broadcast Group, Inc. ("Sinclair") respectfully requests that this Court grant its conditional cross-petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the court of appeals is published at 373 F.3d 372 (3d Cir. 2004) and reprinted at Pet. App. 1a-189a.[1] The court of appeals' order granting and denying rehearing appears at Pet. App. 671a-673a. The court of appeals' order stating that it would not accept petitions for rehearing en banc due to recusals appears at Pet. App. 674a-675a. The order of the Federal Communications Commission ("FCC"), 2002 *Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996, Report and Order and Notice of Proposed Rulemaking,* 18 FCC Rcd. 13,620 (2003) (the "*Order*"), is reprinted at Pet. App. 190a-670a.

JURISDICTION

The court of appeals entered judgment on June 24, 2004, and granted in part and denied in part a timely

[1] Pursuant to Rule 12.5, the materials already reproduced in the petitions for writ of certiorari are not reproduced here. Unless otherwise specifically indicated, all appendix cites in the conditional cross-petition are to the appendix of the Tribune Company, *et al.*

petition for rehearing on September 3, 2004. Justice Souter extended the time for filing petitions for certiorari until January 31, 2005. On January 31, 2005, this Court docketed the first of four petitions for a writ of certiorari of the court of appeals' decision. *See* docket nos. 04-1020, 04-1033, 04-1036, and 04-1045. Pursuant to Rule 12.5 of this Court, this conditional cross-petition is filed in connection with those petitions. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statute involved in this case is the Telecommunications Act of 1996, Pub. L. No. 104-104, tit. II, § 202, 110 Stat. 56, 110-12 (uncodified), which is reproduced in the Appendix, Pet. App. 676a-679a. The FCC's ownership regulations are reproduced in the Appendix, Pet. App. 659a-670a.

STATEMENT OF THE CASE

1. In ordering the FCC to apply a rule that the D.C. Circuit found arbitrary and capricious and the FCC concluded was not "necessary in the public interest," (*Order* ¶ 133 (Pet. App. 278a)), the Third Circuit overstepped its authority and disregarded principles of the law-of-the-case doctrine. In addition to overruling in effect a coordinate court's prior decision, the Third Circuit decision created an irreconcilable conflict regarding the proper interpretation of the deregulatory mandate of Section 202(h) of the Telecommunications Act of 1996, Pub. L. No. 104-104, tit. II, § 202, 110 Stat. 56 ("1996 Act").

The 1996 Act repealed or relaxed several prohibitions on media ownership and required the FCC "to conduct a rulemaking proceeding to determine whether to retain, modify, or eliminate its limitations on the number of television stations that a person or entity may own, operate, or control, or have a cognizable interest in, within the same television market." 1996 Act § 202(c)(2). Congress further directed the Commission to conduct a biennial review of all ownership rules to "determine whether any of such rules are necessary in the public interest as a result of competition." 1996 Act § 202(h).

Thereafter, in 1999 the FCC implemented a new local television ownership rule ("1999 local television ownership rule").[2] In a challenge by Sinclair, the D.C. Circuit found the 1999 local television ownership rule insufficiently deregulatory and arbitrary and capricious and required the FCC to justify it as "necessary in the public interest" or repeal or modify it as required under § 202(h) of the 1996 Act. *Sinclair v. FCC*, 284 F.3d 148, 159, 162-65 (D.C. Cir. 2002).

The FCC on remand concluded that the rule "is not necessary in the public interest to promote competition . . . [and] does not promote, and may even hinder, program diversity, and localism." *Order* ¶ 133 (Pet. App. 278a). However, the FCC maintained that a local television ownership rule was necessary and implemented a new rule (47 C.F.R. § 73.3555(b)).

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[2] The 1999 local television ownership rule is discussed in more detail in the Petition for a Writ of Certiorari by the National Association of Broadcasters ("NAB Petition"). *See* NAB Petition, docket no. 04-1033, at 10.

A number of parties filed petitions for review of the *Order* in various courts of appeals. By lottery, the Third Circuit was selected to review the petitions. On September 3, 2003, the Third Circuit granted a motion to stay the effective date of the FCC's new local television ownership rule and ordered the agency to continue to enforce the 1999 local television ownership rule, pending the outcome of the court's review. *See* Order, nos. 03-3388 *et al.* (Sept. 3, 2003), attached in the Appendix to the Petition for a Writ of Certiorari by Media General, Inc., docket no. 04-1020, at 194a-196a.

After refusing to transfer the case to the D.C. Circuit, the Third Circuit held that the FCC had not justified the relaxed numerical limits in the new local television ownership rule adopted in 2003. Pet. App. 78a. The court maintained the stay requiring the FCC to continue to enforce its 1999 local television ownership rule and retained jurisdiction to review the FCC's treatment of the television ownership rule on remand.

2. The FCC's local television ownership rules perpetuate unfair and unnecessary restrictions on television broadcasters, damaging their ability to compete with rival media companies. To point only to one graphic example, for years Sinclair has been prevented by the FCC's local television rule from owning a second station in Columbus, Ohio, that would permit it to compete effectively with much larger multi-media companies in the market.

Sinclair owns ABC affiliate WSYX(TV), the third-ranked station, and has provided programming pursuant to a grandfathered Local Marketing Agreement ("LMA") to

Fox affiliate WTTE(TV), the fourth-ranked station in the market.[3] Sinclair has on two occasions within the last three years unsuccessfully sought FCC permission to acquire WTTE(TV). In conjunction with its applications, Sinclair submitted detailed analyses demonstrating that the proposed combination would increase local news and public affairs programming and facilitate the stations' transition to digital television. Sinclair also showed that the combination would not be anticompetitive. The LMA has been in operation for more than eight years and no advertiser or competitor, to Sinclair's knowledge, has raised a complaint or expressed a concern about any anticompetitive result of this LMA. In fact, the Antitrust Division of the Department of Justice, the government agency charged with enforcing the antitrust laws, reviewed the Columbus LMA and, because of an absence of anticompetitive concerns, took no action to prohibit the LMA.

The FCC, however, on two occasions dismissed Sinclair's applications as inconsistent with the 1999 local television ownership rule.[4] Because the relevant part of the new local television ownership rule remains unchanged (47 C.F.R. § 73.3555(b)), Sinclair would still be unable to purchase WTTE(TV), without a waiver of that rule.

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[3] An LMA, sometimes known as a time brokerage agreement, "is a type of contract that generally involves the sale by a licensee of discrete blocks of time to a broker that then supplies the programming to fill that time and sells the commercial spot advertisements that support the programming." *Order* ¶ 153 n. 300 (Pet. App. 294a) (citations omitted).

[4] Sinclair has pending an Application for Review to the full Commission of the FCC's dismissal of its most recent application.

In Columbus, Sinclair must compete with two media powerhouses, the Dispatch Printing Company ("Dispatch") and Time Warner. Dispatch has been described by the trade press as a "media dynasty" and is essentially the Goliath of the Columbus market. Dispatch owns CBS affiliate WBNS-TV, the top-ranked station in Columbus whose audience share alone exceeds the combined share of WSYX(TV) and WTTE-TV. Dispatch also owns *The Columbus Dispatch* (the only daily newspaper), the Ohio News Network (a 24-hour state-wide cable news channel), and two Columbus-based radio stations. Yet, no FCC rule prohibits (or should prohibit) Dispatch's ownership interests.

Time Warner owns the dominant cable system, an extremely popular Internet service and content provider, CNN and Headline News (as well as other cable channels like HBO, Cinemax, TBS, TNT, Cartoon Network, and Turner Classic Movies), and the WB network. Time Warner is free to start a local cable news channel. Indeed, the media powerhouse can legally buy a broadcast station in the market, including a top four-ranked station, the very step that the local television ownership rule prevents Sinclair from taking.

In another market that demonstrates the irrationality of the rule, Rochester, New York, Sinclair owns Fox affiliate WUHF(TV), the fourth-ranked station in the market, and is prohibited from acquiring any other top four-ranked station as a result of the top-four restriction. Yet, Sinclair must compete with Time Warner. In addition to the substantial cable assets described above, Time Warner also operates R News (a local cable news channel) and WB16 (a local cable channel that airs WB programming and is virtually indistinguishable to cable customers from a local

television broadcast station). Time Warner may also buy any broadcast station in the market, including a top four-ranked station.

The Columbus and Rochester markets are not atypical. A survey of the media landscape reveals many other markets where television broadcasters routinely face intense competition in local markets from other multifaceted media corporations. Viacom, Inc. ("Viacom") owns over thirty television broadcast stations, predominantly in major markets like Atlanta, Boston, Chicago, Dallas/Fort Worth, Houston, Los Angeles, New York, Philadelphia, San Francisco, and Washington, D.C. It owns the national broadcast networks CBS and UPN and cable networks such as MTV, M2, VH1, Nickelodeon, Nick at Night, TV Land, Showtime Networks, the Movie Channel, Comedy Central, BET, Spike TV, and CMT. Viacom also owns over 150 radio stations. News Corporation owns one of only two Direct Broadcast Satellite ("DBS") systems (which compete with broadcasters and cable operators in every market in the United States), thirty-seven television broadcast stations, the national broadcast network Fox, the national Fox News Channel, the national cable network FX, and twenty regional cable sports networks. Yet, in many local markets the FCC's local television ownership rule prohibits broadcasters from obtaining common control of two stations (*see* NAB Petition at 12) and achieving the critical efficiencies necessary to compete on a level playing field with such multifaceted media corporations.

3. For further description of the local television ownership rule, Sinclair adopts the Statement of the Case in the NAB Petition. NAB Petition at 9-12. For further description of the proceedings below, Sinclair adopts the Statement of the Case in the Petition for a

Writ of Certiorari by the Newspaper Association of America, *et al.* ("NAA Petition"). NAA Petition, docket no. 04-1045, at 12-13.

REASONS FOR GRANTING THE PETITION

The Third Circuit's decision and stay requiring the FCC to continue to enforce the 1999 local television ownership rule that the D.C. Circuit found arbitrary and capricious and insufficiently deregulatory and that the FCC itself concluded "is not necessary in the public interest" (*Order* ¶ 133 (Pet. App. 278a)) effectively overrules the prior decision of the D.C. Circuit in *Sinclair*, 284 F.3d 148 (D.C. Cir. 2002). The Third Circuit's interpretation of § 202(h) also undermines the deregulatory goal and mandate of the 1996 Act and is irreconcilable with prior D.C. Circuit decisions interpreting the same provision. *See Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir.), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002); *Sinclair*, 284 F.3d 148 (D.C. Cir. 2002). This conflict is exacerbated because the Third Circuit retained jurisdiction of this case on remand but only the D.C. Circuit has jurisdiction to review challenges to the FCC's application of its media ownership rules in the context of specific transfer or assignment applications.

The FCC's local television ownership rule creates an ownership restriction that targets television broadcasters and limits their speech, but not the speech of other media companies, such as cable operators, Internet service and content providers, and satellite operators. In light of the wealth of new media outlets and sources in the modern media marketplace, the Third Circuit's conclusion that the

so-called "scarcity doctrine" continues to be a valid justification for a rational basis review of FCC regulations on broadcasters cannot be sustained, and the disparate treatment of television broadcasters violates the First Amendment.

I. THE THIRD CIRCUIT DECISION IN EFFECT IMPERMISSIBLY OVERRULES THE D.C. CIRCUIT'S DECISION IN *SINCLAIR* BY ORDERING THE FCC TO CONTINUE TO ENFORCE THE 1999 LOCAL TELEVISION OWNERSHIP RULE THAT THE D.C. CIRCUIT FOUND INSUFFICIENTLY DEREGULATORY AND ARBITRARY AND CAPRICIOUS AND THAT THE FCC SUBSEQUENTLY DETERMINED COULD NOT BE JUSTIFIED.

In *Sinclair*, the D.C. Circuit found that the 1999 local television ownership rule was insufficiently deregulatory and arbitrary and capricious and required the FCC to justify the rule on remand as "necessary in the public interest" or repeal or modify it as required under § 202(h) of the 1996 Act. *Sinclair*, 284 F.3d at 159, 162-65. The FCC on remand found that the rule "is not necessary in the public interest." *Order* ¶ 133 (Pet. App. 278a). The Third Circuit, however, stayed the effective date of the FCC's new rule and continues to require the FCC to enforce the 1999 local television ownership rule. Pet. App. 78a.

The Third Circuit's mandate to continue to enforce the arbitrary and capricious 1999 rule disregards well-established principles of law-of-the-case doctrine and in effect impermissibly overrules the D.C. Circuit's decision in *Sinclair*. *See Arizona v. California*, 460 U.S. 605, 618 (1983) (Under the law-of-the-case doctrine "when a court

decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case."); *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) ("[A]s a rule, courts should be loathe to [revisit prior decisions of a coordinate court] in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'") (citation omitted); *see also Phillips Petroleum Co. v. F.E.R.C.*, 902 F.2d 795, 799 (10th Cir. 1990) ("To the extent that issues have been decided by [a coordinate court of appeals before remand], review of those issues would be contrary to law of the case.").

The conundrum facing broadcasters is even more serious than the situation that generally arises from conflicts among the circuits, where litigants at least know what the prevailing law is in each circuit. Here, an applicant for an assignment or transfer of a television station that involves the local television ownership rule faces a stay imposed by the Third Circuit that orders the FCC to process the application pursuant to a rule that the D.C. Circuit ruled is arbitrary and capricious. And while the Third Circuit has retained jurisdiction over the local television ownership rule, the D.C. Circuit has *exclusive* jurisdiction in appeals of the FCC's decisions concerning assignment or transfer applications. 47 U.S.C. § 402.

II. THE THIRD CIRCUIT DECISION CONCERNING THE LOCAL TELEVISION OWNERSHIP RULE CONFLICTS WITH DECISIONS OF THE D.C. CIRCUIT REGARDING THE PROPER INTERPRETATION OF THE DEREGULATORY MANDATE OF SECTION 202(h).

This Court's review is necessary to resolve a conflict over the proper interpretation of the deregulatory mandate of § 202(h) of the 1996 Act. That section provides:

> The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.[5]

In *Fox*, the D.C. Circuit found that § 202(h) creates a presumption in favor of deregulation. *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1048 (D.C. Cir.), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002).[6] In *Sinclair*, the D.C. Circuit reiterated that conclusion

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[5] Although not relevant to this petition, in January 2004 Congress amended the 1996 Act and § 202(h), replacing "biennially" with "quadrennially."

[6] In its original opinion, the D.C. Circuit stated: "The statute is clear that a regulation should be retained only insofar as it is necessary in, not merely consonant with, the public interest." *Fox*, 280 F.3d at 1050. On rehearing, the court amended that part of the decision because it concluded that the parties did not fully brief that issue and, in any event, the higher standard was not dispositive of the case, as the FCC had failed to justify the retention of its rule under even the most lenient public interest standard.

specifically in the context of rejecting the FCC's 1999 local television ownership rule as insufficiently deregulatory. *Sinclair*, 284 F.3d at 159, 162-65. The D.C. Circuit's conclusion is supported by both the express language of § 202(h) and the declared purpose of the 1996 Act "to promote competition and reduce regulation." 1996 Act pmbl. Moreover, the FCC itself acknowledged in its *Order* that § 202(h) creates a deregulatory presumption "up-end[ing] the traditional administrative law principle requiring an affirmative justification for the modification or elimination of a rule." *Order* ¶ 11 (Pet. App. 200a).

The Third Circuit, however, held that § 202(h) creates no such presumption and, with respect to the FCC's own conclusion about the deregulatory presumption stated that the FCC was "misguided" by the *Fox* and *Sinclair* decisions. Pet. App. 33a.[7] Indeed, the Third Circuit held that the FCC had authority to implement *more restrictive* ownership limits on television station owners. Pet. App. 34a. Such a conclusion is contrary to the plain language of § 202(h) and creates an irreconcilable conflict with the D.C. Circuit's decisions in *Sinclair* and *Fox*.

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[7] In reaching that decision, the Third Circuit erroneously relied in part on a D.C. Circuit decision, *Cellco Partnership v. FCC*, 357 F.3d 88 (D.C. Cir. 2004), involving a related but distinct statutory provision, 47 U.S.C. § 161. In *Cellco*, the D.C. Circuit held that "necessary in the public interest" in the context of the telecommunications biennial review mandate under § 11 of the 1996 Act, not § 202(h), did not require a stricter standard than the long-standing meaning of the term "necessary." *Cellco*, 357 F.3d at 98.

III. THE THIRD CIRCUIT'S AFFIRMANCE OF THE TOP-FOUR RESTRICTION VIOLATES THE DEREGULATORY MANDATE OF SECTION 202(h).

In the absence of a demonstration that mergers of top four-ranked stations actually harm the public interest in markets of any size, the FCC simply cannot prohibit such mergers under the deregulatory mandate of § 202(h), and accordingly, the Third Circuit's affirmance of the top-four restriction cannot survive scrutiny. The FCC's conclusion that mergers between top four-ranked stations should be prohibited appears to be based in large part on the erroneous and unsupported assumption that top four-ranked stations are dominant forces in every market. *See Order* ¶ 196 (Pet. App. 328a-329a). Even ignoring competition from other media sources such as cable, satellite, and the Internet, the record is replete with examples, such as Columbus, Ohio, where a market is dominated by one or two stations, and no merger by the other stations would challenge that supremacy.

Moreover, the top-four restriction, which the FCC has acknowledged targets mergers between local stations affiliated with ABC, CBS, Fox, and NBC (*Order* ¶ 196 (Pet. App. 328a-329a)), ignores the fact that network affiliations are private contractual matters over which the FCC has no jurisdiction. Stations may drop or add network affiliations at any time, and the FCC has no involvement in the process. Thus, while the FCC can use its top-four restriction to bar assignments or transfers, which require its prior approval, parties can freely change their network affiliations at other times, readily circumventing the rule.

A network shake-up in the Jacksonville, Florida market, which occurred outside the context of any top-four analysis by the FCC, provides evidence of the arbitrary

nature of the rule. In that market, Station WJXT(TV) dropped its CBS network affiliation after it was unable to reach an agreement with the network. Clear Channel, which already owns Fox affiliate WAWS(TV), picked up the CBS affiliation for its station WTEV-TV.[8] According to the latest Nielsen ratings, these two stations are presently the fourth-ranked and top-ranked stations, respectively, in the Jacksonville market. Thus, an affiliation switch enabled one licensee to own two top four-ranked stations, but the same licensee would have been arbitrarily barred by the top-four restriction from owning those same stations via an assignment or transfer.

Thus, the top-four restriction and its affirmance by the Third Circuit cannot be justified. It is based on erroneous conjecture, rather than proof, of actual competitive harm, and it is arbitrary and capricious. Accordingly, it cannot survive the deregulatory presumption of § 202(h).

IV. THE PROVISIONS OF THE LOCAL TELEVISION OWNERSHIP RULE UPHELD BY THE THIRD CIRCUIT SINGLE OUT A PARTICULAR COMMUNICATIONS MEDIUM FOR UNIQUE RESTRICTIONS ON SPEECH AND THEREFORE VIOLATE THE FIRST AMENDMENT.

The FCC limits the number of stations a television broadcaster may own in a local market, but there are no comparable ownership restrictions on other media, such as

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[8] In this same market, the Gannett Co., Inc. owns WTLV(TV), Jacksonville, the NBC affiliate and second-ranked station, and WJXX(TV), Orange Park, the ABC affiliate and fifth-ranked station. At any time, depending upon ratings, both of these stations could be top four-ranked stations yet not violate the top-four restriction.

cable, satellite, and the Internet. This is so even though the FCC recognized that broadcasters "face intense competitive pressure from alternative video programming" from such sources (*Order* ¶ 125 (Pet. App. 274a)) and that viewers unquestionably consider programming offered on cable or satellite channels as substitutes for broadcast programming. *See Order* ¶ 143 (Pet. App. 286a-287a) ("These viewers need only touch their remote control to switch between the programming offered by cable networks and that of local broadcast television stations."). In fact, the FCC's own studies conducted in conjunction with its ownership proceeding indicate that ratings for programming provided by cable networks have been steadily increasing while ratings for programming provided by broadcast networks have been on the decline. *Order* ¶ 124 (Pet. App. 273a-274a).

The FCC's disparate treatment improperly singles out a communications medium and class of speakers, triggering heightened scrutiny of the regulation. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 640 (1994) ("[L]aws that single out the press, or certain elements thereof, for special treatment pose a particular danger of abuse by the State.") (citation omitted); *Minneapolis Star & Tribune Co. v. Minnesota Cmm'r of Revenue*, 460 U.S. 575, 582 (1983) (State regulation singling out the press "burdens rights protected by the First Amendment [and] cannot stand unless the burden is necessary to achieve an overriding governmental interest."); *FCC v. League of Women Voters*, 468 U.S. 364, 384 (1984) (Heightened scrutiny applies where the statute "singles out noncommercial broadcasters

and denies them the right to address their chosen audience on matters of public importance.").[9]

As other Petitioners have demonstrated, the "scarcity doctrine" can no longer provide a basis for regulating television broadcast ownership under a rational basis test. *See* Petition for a Writ of Certiorari by Tribune Company, *et al.*, docket no. 04-1036, at 13-19; Petition for a Writ of Certiorari by Media General Petition, docket no. 04-1020, at 10-23; NAA Petition at 26-28. Dramatic changes in the video marketplace since the Court first espoused the scarcity rationale more than thirty-five years ago, including the advent of DBS service and the Internet and the proliferation of cable networks, undermine the justification for such an intrusive regulation. Thus, the FCC's local television ownership rule targeting broadcasters and burdening their ability to speak through the acquisition of and operation of television stations must be scrutinized under a stricter standard and, under that standard, invalidated.

[9] *See also* Tribune Petition at 19-24.

CONCLUSION

The conditional cross-petition for a writ of certiorari should be granted.

Respectfully submitted,

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